(23)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 623

JOSEPH J. BODELL, EXECUTOR, ESTATE OF FREDERICK BODELL,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

IRA LLOYD LETTS,
Counsel for Petitioner.

ANDREW P. QUINN,
RICHARD F. CANNING,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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No.

JOSEPH J. BODELL, EXECUTOR, ESTATE OF FREDERICK BODELL,

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v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner, Joseph J. Bodell, Executor under the will of Frederick Bodell, a citizen of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the above case.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938. The judgment of the Circuit Court of Appeals was entered on November 3, 1943.

Question Presented.

Whether there should be included in the gross estate of Frederick Bodell for Federal estate tax purposes the proceeds of two life insurance policies taken out by him upon his own life prior to the effective date of the Revenue Act of 1918.

Statutes Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) Except as otherwise specifically provided therein, subsections (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Statement of the Case.

Frederick Bodell died on June 20, 1938, a resident of Providence, Rhode Island. The petitioner is the executor under his will (R. 24).

At the date of death of the decedent there were in effect upon his life eight policies of insurance, the proceeds whereof paid at his death were $120,260.07 (R. 24), all of which are

now conceded by the petitioner to be includible in the gross estate with the exception of the following:

1. Policy No. 178772, Provident Mutual Life Insurance Co. of Philadelphia. This was an endowment policy in the face amount of $5,000, taken out by the decedent on October 31, 1911. When originally issued the policy was payable to the decedent on October 31, 1955, if living, otherwise to his mother, if living, otherwise to his executors, administrators or assigns. On May 5, 1918 the designation of the insured's mother as beneficiary was irrevocably changed to Albina Elise Bodell, wife of the insured. The proceeds paid at death were $5,017.10. (Stipulation of Facts, Exhibit A, R. 25, 27).

2. Policy No. 398704, Massachusetts Mutual Life Insurance Co. This was an ordinary life policy in the face amount of $10,000 taken out by the decedent on March 1, 1917. When originally issued, the policy was payable to the insured's mother. On October 6, 1917, the beneficiary was changed to Albina Elise Bodell if living at the death of the insured, otherwise to his executors, administrators or assigns. The decedent reserved the right to change the beneficiary at any time. (Stipulation of Facts, Exhibit H, R. 26, 32).

The decedent paid the premiums on each of the above policies.

Rulings of the Court Below.

The Circuit Court of Appeals, affirming the United States Board of Tax Appeals (now the Tax Court of the United States), held that the proceeds of the policies were includible in the gross estate. The Court rejected the contention of the petitioner that under the authority of *Lewellyn* v. *Frick*, 268 U. S. 238, *Bingham* v. *United States*, 296 U. S. 211, and *Industrial Trust Co.* v. *United States*, 296 U. S. 220, subsections (g) and (h) of section 302 of the Revenue Act of 1926 are not to be construed as applicable to insurance policies

issued prior to the effective date of the Revenue Act of 1918. The Court held that in view of the decisions of this Court in *Helvering* v. *Hallock*, 309 U. S. 106, and *United States* v. *Jacobs*, 306 U. S. 363, the earlier cases mentioned were no longer controlling.

Reasons for Granting the Petition.

The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court.

In *Lewellyn* v. *Frick*, 268 U. S. 238, it was held that the insurance section of the act would not be construed as applicable to policies issued prior to the passage of the 1918 Act since to construe the section retroactively would raise grave doubts as to its constitutionality. The principle of statutory construction so enunciated in the *Frick* case was reaffirmed by a unanimous court in *Bingham* v. *United States*, 296 U. S. 211. In *Industrial Trust Co.* v. *United States*, 296 U. S. 220, the principle of the *Frick* case was again held controlling in a case where the policies antedated the passage of the Revenue Act of 1926, section 302 (h) of which was claimed by the government to make the insurance section of the law expressly retroactive. The decisions in these cases constitute an application of a long-settled rule of construction that statutory provisions are to be construed if possible in such a way as to avoid grave doubts as to their constitutionality. The authority of these cases has never been questioned by later decisions of this Court and the cases are controlling.

Conclusion.

For these reasons it is respectfully submitted that this petition should be granted.

IRA LLOYD LETTS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the United States Board of Tax Appeals (now the Tax Court of the United States) was filed June 9, 1942 and is reported in 47 B.T.A. 62 (R. 11-19).

The opinion of the Circuit Court of Appeals was filed November 3, 1943 and is reported in 138 F. (2d) 553.

The Facts.

The facts are sufficiently stated in the petition, p. 2.

ARGUMENT.

The Revenue Act of 1926 is not to be construed as applicable to insurance policies issued prior to the effective date of the Revenue Act of 1918.

The two policies involved herein were issued respectively on October 30, 1911 and March 1, 1917. The Revenue Act of 1918, which was the first of the revenue acts expressly to require the inclusion of life insurance proceeds in the gross estate, became effective on February 24, 1919. Prior to such effective date the insured had designated named persons as beneficiary under each policy. Under one policy he had no right to change the beneficiary so designated; under the other, he had such right but did not exercise it subsequent to the effective date of the 1918 Act.

Lewellyn v. *Frick*, 268 U. S. 238, arose under the Revenue Act of 1918 and involved several life insurance policies issued prior to the effective date of the Act. The Court, speaking through Mr. Justice Holmes, held that the proceeds of the policies were not includible in the gross estate, since to construe the insurance section of the Act as retroactive would raise grave doubts as to its constitutionality, which doubts are to be avoided by construing the statute as referring only

to transactions taking place after it was passed. Certain of the policies involved in the *Frick* case provided for a change of beneficiary at the option of the insured, and the opinion of the Court was intended by it to apply to these policies as well as to other policies involved in the case wherein the decedent retained no incidents of ownership. This is brought out by the opinion of the Court in *Bingham* v. *United States*, 296 U. S. 211, wherein the Court has occasion to allude to its opinion in the *Frick* case.

The *Bingham* case arose under the Revenue Act of 1918 and involved certain policies issued prior to 1918 wherein the decedent retained a "possibility of reverter" that is, the proceeds were payable to a named beneficiary if living, otherwise to the insured's estate. The District Court (7 F. Supp. 907), relying on the *Frick* case, held that the policies could not be taxed whether or not the decedent retained legal incidents of ownership. The Circuit Court of Appeals for the First Circuit (76 F. (2d) 573) reversed the judgment of the District Court on the ground that the provisions of the policies in the *Frick* case for a change of beneficiary were not referred to by this Court in its opinion. This Court reversed, holding that the distinction sought to be drawn by the Circuit Court of Appeals between the *Bingham* case and the *Frick* case was untenable, that all of the provisions of all the policies involved in the *Frick* case were before the Court and that its decision in that case must be deemed to have applied to all of the policies in that case.

On this ground the decision of the Court was unanimous. As an alternative ground, the majority of the Court held that under the authority of *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, no taxable transfer arose out of the termination at death of the insured's possibility of reverter. It is to be noted, however, that Justices Brandeis, Stone and Cardozo,

who had dissented in the *St. Louis Union Trust Co.* cases, concurred specially in the *Bingham* case by joining only in the first ground of the opinion, namely that the *Frick* case was controlling. Chief Justice Hughes, who had likewise dissented in the *St. Louis Union Trust Co.* cases, concurred in the second ground of the *Bingham* opinion only because he felt bound to follow the precedent of the former decisions. It is true that *Helvering* v. *Hallock*, 309 U. S. 106, overruled the *St. Louis Union Trust Co.* cases and thus in substance may have overruled the holding of the *Bingham* case that the retention of a possibility of reverter under an insurance policy is not an incident of ownership. The *Hallock* case does not, however, purport to overrule the first ground of the *Bingham* decision.

The significance of the special concurrence by the minority in the *Bingham* case is to make it clear that these four Justices were of the opinion that there were two separate and distinct grounds for the decision in the *Bingham* case, and that while they were of the opinion that the retention of a possibility of reverter would ordinarily constitute a sufficient basis for the imposition of the tax, yet they were of the opinion that the tax should not be imposed where the retroactivity feature was present. The view of these four Justices as to the effect of a possibility of reverter in a case not involving retroactivity is now, under the *Hallock* case, the view of the majority of this Court. It is submitted that this Court should recognize that there were two separate grounds of the *Bingham* decision and that the first ground, involving the issue of retroactivity, has never been overruled.

In *Industrial Trust Co.* v. *United States*, 296 U. S. 220, decided on the same day as the *Bingham* case, the policies antedated the passage of the 1918 Act, but the insured died subsequent to the passage of the Revenue Act of 1926. The government contended that section 302 (h) of the 1926 Act

made the insurance section of the law expressly retroactive. This Court held it debatable whether section 302 (h) would have this effect, and that in any event if it did the provision was open to grave doubts as to its constitutionality and the rule of the *Frick* case controlled.

The Circuit Court of Appeals in the present case held that in view of the decisions of this Court in the *Hallock* case and in *United States* v. *Jacobs*, 302 U. S. 363, the *Bingham* and *Industrial Trust Co.* cases were no longer controlling. It is submitted that this conclusion overlooks entirely the real point of the *Frick*, *Bingham* and *Industrial Trust Co.* cases. That point is that, as a matter of statutory construction, based upon the long-settled principle that statutes are to be construed in such a way as to avoid doubts as to their constitutionality, the taxing statute should not be construed as applicable to policies taken out before the 1918 Act. This principle of construction has been followed by this Court on many occasions, for example, in *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375; *Blodget* v. *Holden*, 275 U. S. 142; *Crowell* v. *Benson*, 285 U. S. 22; *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1; and *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337. This Court did not purport to overrule this principle in the *Hallock* case. The real question involved in that case was whether there was any distinction for tax purposes between a possibility of reverter and a contingent remainder, and the conclusion of this Court was that there was no distinction. The principle of statutory construction to which we have referred was in no way involved in that case. Nor did that case purport to overrule the principle of *stare decisis*. The *St. Louis Union Trust Co.* cases were overruled on the basis that adherence to those cases was unwarranted "when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience".

Clearly adherence to the decisions in the *Frick, Bingham* and *Industrial Trust Co.* cases would not involve collision with any prior doctrine, but on the contrary the rule of statutory construction which the Court followed in those three cases was one of long standing.

The *Jacobs* case, relied on by the Circuit Court of Appeals, likewise did not purport to overrule the principle of statutory construction applied by this Court in the *Frick, Bingham* and *Industrial Trust Co.* cases. In the Jacobs case the question at issue was one of the constitutionality of the taxing statute as applied to joint estates created prior to the first enactment of the statute, and the decision of the Court was that the tax could constitutionally be applied. The Court did not, however, purport to overrule its earlier decisions that as a matter of construction the statute did not apply retroactively to insurance policies. The fact that this Court has held one kind of property to be taxable in the *Jacobs* case does not warrant the holding that earlier decisions, construing the statute as not applicable to an entirely different kind of property, have been overruled.

Conclusion.

The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in the *Frick, Bingham* and *Industrial Trust Co.* cases. It is in conflict with a doctrine of statutory construction followed by this Court in a long series of cases. For these reasons we submit that the petition for certiorari should be granted.

Respectfully submitted,

IRA LLOYD LETTS,
Counsel for Petitioner.

ANDREW P. QUINN,
RICHARD F. CANNING,
Of Counsel.

No. 626

In the Supreme Court of the United States

October Term, 1944

[redacted]

Petitioners,

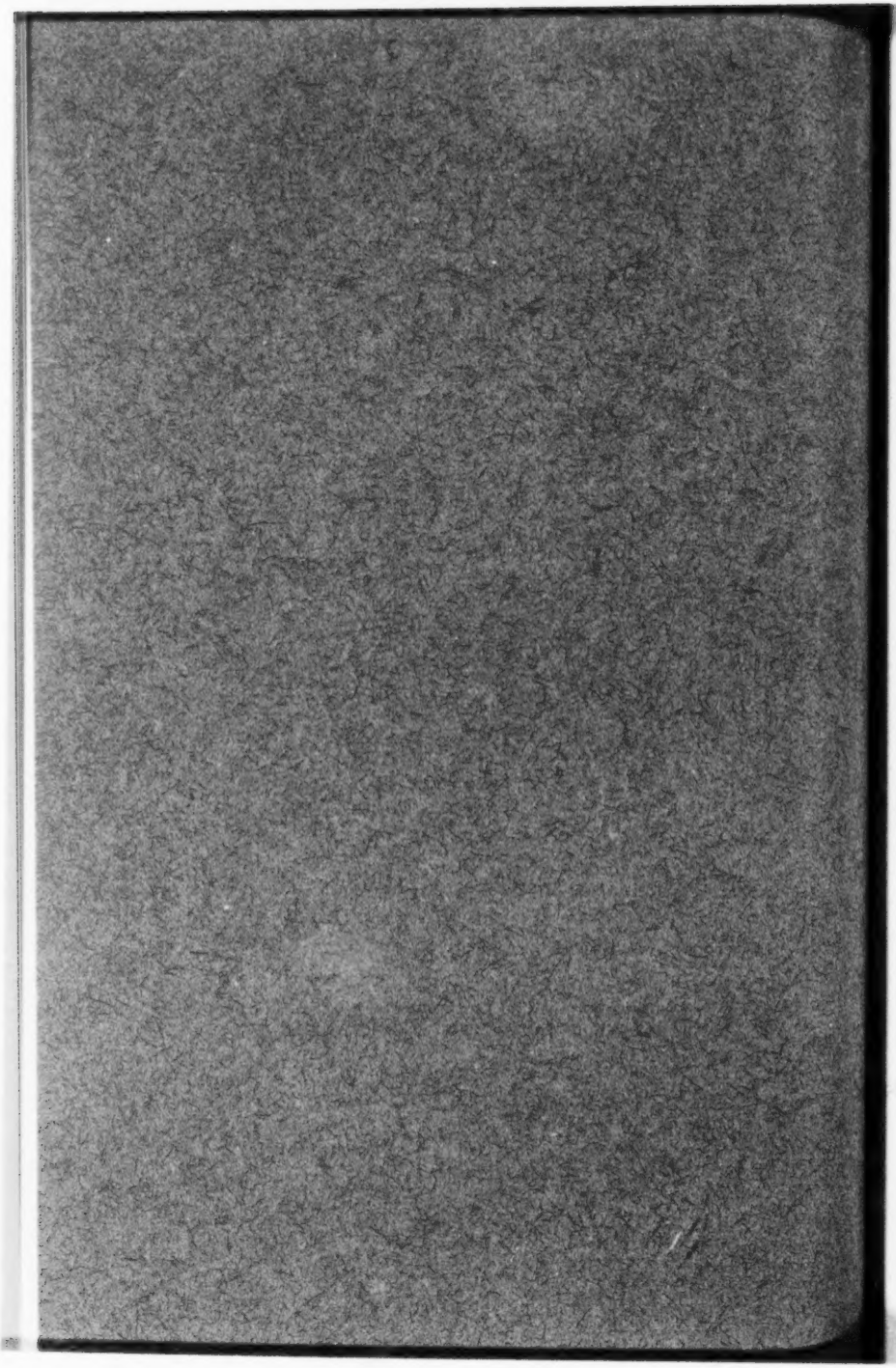
vs.

[redacted]

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [redacted] CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 623

JOSEPH J. BODELL, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 11–19), now the Tax Court of the United States, is reported at 47 B. T. A. 62. The opinion of the Circuit Court of Appeals (R. 70–77) is reported at 138 F. 2d 553.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 3, 1943 (R. 77). The petition for a writ of certiorari was filed January 21, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Were the proceeds of insurance policies taken out by the decedent on his own life, payable to his wife if living, otherwise to his estate, includible in his gross estate under Section 302 (g) and (h) of the Revenue Act of 1926, as amended? Is the issue affected by the fact that the policies were taken out prior to the enactment of the Revenue Act of 1918 where there was a reservation of the power to change the beneficiary in one and the other was an endowment policy embodying a possibility of reverter?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable

by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

Treasury Regulations 80 (1937 ed.), as amended by T. D. 5032, 1941–1 Cum. Bull. 427:

ART. 27. *Insurance receivable by other beneficiaries.*—The amount in excess of $40,000 of the aggregate proceeds of all insurance on the decedent's life not receivable by or for the benefit of his estate must be included in his gross estate as follows:

* * * * *

(2) To the extent to which such insurance was taken out by the decedent upon his own life (see article 25) on or before January 10, 1941, and with respect to which the decedent possessed any of the legal incidents of ownership at any time after such date or, in the case of a decedent dying on or before such date, at the time of his death.

Legal incidents of ownership in the policy include, for example, the right of the insured or his estate to its economic bene-

> fits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possesses a legal incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him.[1]

STATEMENT

Decedent died June 20, 1938, and was survived by his wife, Albina Elise Bodell. An estate tax return was timely filed by decedent's executor with the Collector of Internal Revenue for the District of Rhode Island (R. 12).

At the time of decedent's death there were in effect the following policies of insurance on his life[2] (R. 12):

(1) Policy No. 398704, Massachusetts Mutual Life Insurance Company, was an ordinary life policy for $10,000 taken out by decedent March 1,

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[1] The sentence last above quoted in the Regulations was restored in 1941. Article 25 of the 1934 edition of Treasury Regulations 80 had previously included a similar provision but it was eliminated in 1937 by T. D. 4729, 1937–1 Cum. Bull. 284.

[2] Other policies, involved in the Board proceeding (R. 13), are now conceded to be taxable (R. 68). The $40,000 exclusion has been allowed (R. 13).

1917. It was first made payable to decedent's mother, but on October 6, 1917, was made payable to decedent's wife, if living at the time of his death, otherwise to decedent's estate. Decedent reserved the right to change the beneficiary at any time (R. 32–34b).

(2) Policy No. 178772, Provident Mutual Life Insurance Company of Philadelphia, was an endowment policy for $5,000 taken out by decedent October 31, 1911, payable to him on October 31, 1955, if living, otherwise to his mother, if living, otherwise to his estate. Decedent's wife was irrevocably named beneficiary, instead of his mother, on May 6, 1918. (R. 27–31.)

The decedent paid all of the premiums on the above policies. The executor did not report any of the proceeds of the insurance policies in the decedent's estate tax return. (R. 13.)

The Board sustained the action of the Commissioner in including the proceeds of the policies in the gross estate (R. 19), and the Circuit Court affirmed (R. 77).

ARGUMENT

The Circuit Court properly concluded that (R. 74) the cases of *Bingham* v. *United States,* 296 U. S. 211, and *Industrial Trust Co.* v. *United States,* 296 U. S. 220, relied upon by the taxpayer (Pet. 4) were discredited by the more recent decisions of this Court in *Helvering* v. *Hallock,* 309 U. S. 106, and *United States* v. *Jacobs,* 306 U. S.

363, and that the retention of rights in the insurance policies, based upon survivorship, brought the case within the broad provisions of Section 302 (g) and (h) of the Revenue Act of 1926, *supra*.

Clearly, the proceeds of the policy in which the insured retained the right to change the beneficiary at any time must be included in the gross estate. The continued existence of the insured's power to change the beneficiaries after the enactment of the 1918 Act is a complete answer to any contention based upon retroactivity. *Broderick* v. *Keefe*, 112 F. 2d 293 (C. C. A. 1st); *Commissioner* v. *Washer*, 127 F. 2d 446 (C. C. A. 6th), certiorari denied, 317 U. S. 653; *Keefe* v. *United States*, 46 F. Supp. 1016 (C. Cls.), certiorari denied, 318 U. S. 768.

The proceeds of the remaining policy, in which the decedent retained the right to have the fund paid to him if he survived the endowment period, and if he did not, to his estate, provided the named beneficiary should predecease him, are likewise includible in his gross estate under the principles laid down in the *Hallock* and *Jacobs* decisions. In the memorandum filed with this Court in answer to the petition for certiorari in the *Washer* case[3] (No. 233, October Term, 1942)

[3] That case involved pre-1918 insurance policies in most of which some other rights were retained but we approached the problem on certiorari as though the decision were based on the possibility of reverter.

it was recognized that the decision there, as does the decision here, conflicted in principle with the *Bingham* and *Industrial Trust Co.* decisions. The view was there taken, however, that the basis for that conflict had been removed by the *Hallock* case[4] and that since it was unlikely that any lower court would now reach a contrary result, there was not such a conflict as to call for review by this Court. The denial of certiorari under the circumstances thus presented to the Court in the *Washer* case suggests that similar action should be taken here.

Since, under the ruling of the *Hallock* case, the retention of rights based on survivorship brings the case within the scope of Section 302 (g), the fact that the policy was taken out before 1918 is immaterial under the holding of the *Jacobs* case,[5] the rationale of which is equally applicable here. The court below properly concluded (R. 76) that with the constitutional doubts of the *Bingham* case thus dispelled, the construction

[4] In *Chase Nat. Bank* v. *United States*, 116 F. 2d 625 (C. C. A. 2d), the court referred to the *Hallock* decision as overruling *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and concluded that (p. 627) "*Bingham* v. *United States* must fall with them". See also *Bailey* v. *United States*, 31 F. Supp. 778 (C. Cls.).

[5] The dissenting opinion in the *Jacobs* case is based on the objection of retroactivity urged by the taxpayer here, and *Lewellyn* v. *Frick*, 268 U. S. 238, was there cited; but the majority applied the rule which we urge here. The situations are analogous and the decision, particularly when coupled with the decision in the *Hallock* case, sustains the action of the court below.

given to Section 302 (h) by this Court in the *Industrial Trust Co.* case was no longer controlling. The plain language of Section 302 (h) makes Section 302 (g) applicable to pre-1918 policies.

CONCLUSION

The decision below is correct. There is no such conflict as to call for a review by this Court. The petition should be denied.

Respectfully submitted.

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FEBRUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944